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STATE DOCUMENTS

MONTANA DEPARTMENT OF NATURAL RESOURCES & CONSERVATION

MEMBERS OF THE BOARD - CHAIRMAN CECIL WEEDING, DR. WILSON F. CLARK, VIOLA HERAK, WILLIAM BERTSCHE, DAVID G. DRUM, ROY HUFFMAN, CHARLES HASH

DNRC
John C. Orth, Director

AUG 19 77

July 20, 1977

After reviewing public comments received by the Department of Natural Resources and Conservation (Department) on or before July 15, 1977 concerning the Yellowstone River Basin Draft Addendum Environmental Impact Statement for Water Reservation Applications, the Department has determined that this draft statement satisfies the requirement for a final environmental impact statement. Therefore, pursuant to MAC 36-2.2(6)-P240 (2) (a), a final impact statement will not be compiled. However, copies of all comments will be distributed to those parties originally receiving the Draft Addendum, as provided in the same rule. These comments are attached to this transmittal letter.

Water reservation applicants have a reasonable time to respond in writing to these comments. If applicant responses are not received by 5:00 p.m., August 4, 1977, it will be assumed by the Department that the right of the applicant to respond to comments has been waived. An extension of 15 days may be requested to ensure adequate time to respond to comments.

The Department, believing all pertinent Montana Environmental Policy Act (MEPA) requirements are being complied with and will be met by August 8, 1977, plans to proceed with hearings on the applications under the Water Use Act scheduled for that date.

Sincerely,

*Wayne Wetzel*WAYNE WETZEL
ENVIRONMENTAL COORDINATOR

WW:bjh

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United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

BILLINGS AREA OFFICE

316 NORTH 26TH ST.

BILLINGS, MONTANA 59101

IN REPLY REFER TO:

Environmental Quality

RECEIVED

JUL 15 1977

Mr. Wayne A. Wetzel
Montana Department of Natural
Resources & Conservation
Water Resources Division
32 South Ewing
Helena, Montana 59601

JUL 18 1977

MONT. DEPT. OF NATURAL
RESOURCES & CONSERVATION

Dear Mr. Wetzel:

Our review of the draft environmental statement was completed and comments furnished to your office on February 11, 1977. In that letter our concerns for Indian water rights were given in detail and we hope that they will be considered by the Department of Natural Resources and Conservation.

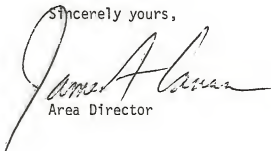
In regards to the Draft Addendum Environmental Statement for Water Reservation Applications, we wish to submit the following comments:

1. The Department of Natural Resources and Conservation proposes to raise the Tongue River Dam thereby increasing the storage to 58,000 acre feet. This increased storage will satisfy the irrigation needs of 13,000 acres with 28,750 af being available solely for industrial purposes. Possible industrial complexes in the area of the Tongue River Dam will serve contrary to the desires of the Northern Cheyenne people for clean air and water, as well as diminishing the flow of water reaching the Northern Cheyenne Reservation. In addition, a reduced water flow from the raised dam will likely contain greater amounts of salts; the increased salinity would require careful irrigation application and may be detrimental to irrigated crops and pasture.
2. The draft addendum does not discuss the potential hazards of increased storage in the Tongue River Dam. Has the geology of the area been studied to ascertain if an enlarged reservoir will be safe?
3. The Bureau of Reclamation's offstream storage reservations for three reservoir sites do not appear to be unreasonable. With offstream storage the water would be diverted to storage sites during surplus flow periods and upstream water interests will probably not be affected. However, Indians and non-Indian interests downstream may be complicated.



We are in agreement with the report that there is not enough water physically in the basin to satisfy all the water reservations requests that have been filed. Certainly, there is not enough water to satisfy water reservation requests and the water rights of the Indian people. Hopefully, as stated in your letter of February 18, all water reservations eventually approved will be conditioned on the protection of Indian water rights.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "James A. Hansen". The signature is written in dark ink and is positioned above the typed name "Area Director".

Area Director

LAW OFFICES OF

POORE, McKENZIE, ROTH, ROBISCHON & ROBINSON, P. C.

JAMES A. POORE, JR.
ROBERT A. POORE
ALLEN R. MCKENZIE
URBAN L. ROTH
JAMES A. ROBISCHON
JAMES A. POORE, III
DONALD C. ROBINSON
DAVID J. WING

A PROFESSIONAL CORPORATION
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TELEPHONE 792-0488
AREA CODE 408

July 12, 1977

RECEIVED
JUL 13 1977
MONT. DEPT. OF NATURAL
RESOURCES & CONSERVATION

Mr. Wayne A. Wetzel
Environmental Coordinator
Montana Department of Natural
Resources and Conservation
Water Resources Division
32 South Ewing
Helena, Montana 59601

Re: Draft Addendum Environmental Impact Statement
for Water Reservation Applications

Dear Mr. Wetzel:

Enclosed herein please find Utah International,
Inc.'s Comments on Draft Addendum Environmental Impact
Statement for Water Reservation Applications, together
with attached Certificate of Service.

Very truly yours,

POORE, McKENZIE, ROTH,
ROBISCHON & ROBINSON, P.C.

By 

Urban L. Roth

ULR:ch
Enclosure

BEFORE THE DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION OF THE
STATE OF MONTANA

IN THE MATTER OF APPLICATIONS FOR)	
RESERVATION OF WATER NO. 1781-r,)	
6294-r, 8476-r, 9442-r, 9646-r,)	
9931-r, 9933-r, 9934-r, 9935-r,)	
9937-r, 9938-r, 9939-r, 9940-r,)	UTAH INTERNATIONAL, INC.'S
9941-r, 9942-r, 9943-r, 9944-r,)	COMMENTS ON DRAFT ADDENDUM
9945-r, 9946-r, 9947-r, 9948-r,)	ENVIRONMENTAL IMPACT STATE-
9949-r, 9951-r, 9952-r, 9953-r,)	MENT FOR WATER RESERVATION
9954-r, 10,003-r, 10,004-r,)	<u>APPLICATIONS</u>
10,005-r, 10,006-r & 11349-r42L&M,)	
12330-r42KJ, 12331-r43Q,)	
12332-r42K, 12333-r43P, 12334-01)	
through 12334-14.)	

Utah International, Inc. (hereafter "Utah"), within the time permitted by law and the Draft Addendum Environmental Impact Statement for Water Reservation Applications (hereafter "Addendum"), submits the following comments on said Addendum:

1. Utah incorporates by reference and in haec verba its comments to the Draft Environmental Impact Statement (hereafter "DEIS") and the Final Environmental Impact Statement (hereafter "FEIS").

2. On page 1, the Addendum perpetuates the legal fallacy articulated in the DEIS and FEIS by stating that any water reservation approved prior to approval of the suspended permit applications would have a preference of use over those permits. Utah's application for a water right was filed prior to the enactment of the Yellowstone Moratorium (Section 89-8103, et seq., R.C.M., 1947), and

1. UTAH INTERNATIONAL, INC.'S COMMENTS ON DRAFT ADDENDUM ENVIRONMENTAL IMPACT STATEMENT FOR WATER RESERVATION APPLICATIONS

at the date of enactment of the Yellowstone Moratorium, Section 89-890(5), R.C.M., 1947, provided:

"A reservation under this section shall date from the date the order reserving the water is adopted by the board, and shall not adversely affect any rights in existence at that time."

The Montana Supreme Court has specifically held that a priority right, i.e., the date the application for the beneficial use of water is filed, is an "existing right." Therefore, the position taken in the Addendum is in direct conflict with settled Montana law. Additionally, the construction placed upon the Moratorium Act by the authors of the DEIS, FEIS and Addendum would constitute the taking of a valuable property right without due process of law, contrary to Section 17, Article II, of the Montana Constitution, and Section 1 of the Fourteenth Amendment to the United States Constitution.

3. On page 5, under "New Applications," the Addendum lumps all Bureau of Land Management applications together and fails to define the sources from which the applications reserve water and the specific geographical areas within which the reservations will have an environmental impact. Therefore, the Addendum totally fails to even identify the geographical locations of the applications so that an intelligent assessment of environmental impacts can be made. Subsequent references to BLM applications only tend to confuse and obfuscate, rather than clarify or define.

4. On page 32, the following 2 paragraphs appear:

2. UTAH INTERNATIONAL, INC.'S COMMENTS ON DRAFT ADDENDUM ENVIRONMENTAL IMPACT STATEMENT FOR WATER RESERVATION APPLICATIONS

"Powder Subbasin. For the Powder River, 200 cfs (144,800 af/y) is required by the BLM; the average annual flow is 416,000 af/y. Figure 3 shows the effect of this requested reservation on the surplus waters of the Powder River.

"While each of the streams identified in the application flows at the requested level during portions of the year, not all of the streams contribute those levels during all periods. In fact, during most of the year, the majority of these streams would not yield the flows requested. Even streams whose average annual flow is several times larger than the request, because of large seasonal flow fluctuations, would not satisfy this request year round. However, consumptive use of these streams (primarily for irrigation) occurs mostly either during spring runoff or after rain storms, when flows could be much higher than the requested minimum flows. Therefore, water availability for future irrigation may be only slightly hampered by the implementation of this water reservation request."

However, the applications which have been delivered to Utah (purportedly all applications) do not include a BLM application for 144,800 af/y in the Powder River. Therefore, there is a patent conflict between the content of the quoted paragraph and the applications delivered to Utah and a patent conflict between the content of the quoted paragraphs and a description of the new applications contained on page 5 of the Addendum.

Moreover, it is self-evident that the environmental impacts of a reservation of the size described in the quoted paragraphs have not been addressed. If the purported BLM application for 144,800 af/y is superimposed upon the 168,245 af/y requested by the North Custer Conservation District and the Powder River Conservation District, then the treatment of the environmental impacts

3. UTAH INTERNATIONAL, INC.'S COMMENTS ON DRAFT ADDENDUM ENVIRONMENTAL IMPACT STATEMENT FOR WATER RESERVATION APPLICATIONS

of the request is totally inadequate even if read in pari materia with the DEIS and the FEIS.

5. In evaluating the Conservation Districts' applications for reserved water, the Addendum continues to assume a factual situation so speculative as to render the entire statement void. The authors continue to assume that an in-stream reservoir--probably located at the Moorhead site--will fund the future irrigation requests. However, at the present, there is absolutely no basis upon which such a hypothesis can be based, since no in-stream reservoir is even contemplated. The authors of the Addendum nevertheless continue to infer that there is some viable, realistic, not-too-distant-in-the-future plan to store water for the Conservation Districts' requests. This inference is totally unsound, erroneous, and misleading. The Board of Natural Resources and Conservation and the public should be advised categorically that no viable reservoir project exists which is intended to fund the Conservation Districts' irrigation requests.

6. On page 47 of the Addendum, the authors of that document purport to delimit the cumulative impacts of granting consumptive use reservation requests. However, nowhere, either under primary or secondary impacts, are listed any of the economic impacts of granting the consumptive use applications which in turn, particularly with regard to the Powder River subbasin, if granted, will totally preclude industry from beneficially using any substantial amount of its waters. The Department of Natural Resources and

Conservation is aware of the plans of at least one industrial applicant to erect coal gasification or liquification plants using waters from the Powder River. The Department is fully aware of the fact that the potential cost of these projects could be in excess of \$1,000,000,000. The Department is also aware of the fact that it is the prospective intent of the applicant to mine Montana coal to feed those plants. Nowhere in the Addendum is there any recognition of the enormous economic impact industrial use of Powder River water would have not only on a parochial, but also upon a statewide basis. Absolutely no recognition is given to the fact that a large work force would be initially employed and that multiplier factors would have enormous economic impact upon state economy.

There is absolutely no recognition that at the present time, extraction of coal is subject to a severance tax up to 30 percent of the gross value of the mined coal.

There is absolutely no recognition of the fact that granting the reservation would have a very definite intimidating effect upon future expansion of the coal-mining industry in Montana.

The Addendum does not purport to address the subject of the economic impact of additional income taxes and property taxes realized from the additional employment during the construction period, the permanent employment created by the capital structures, property value increases reflected in additional housing and other related buildings and business structures, and taxation of the industrial structures themselves.

5. UTAH INTERNATIONAL, INC.'S COMMENTS ON DRAFT ADDENDUM ENVIRONMENTAL IMPACT STATEMENT FOR WATER RESERVATION APPLICATIONS

There is absolutely no recognition of the economic impact which industrial developments--as an alternative to the described consumptive uses--would have in regard to the trust fund created out of coal tax revenue. Such an impact would have state, not just regional, implications.

There is absolutely no assessment of the chilling effect that granting the reservation requests would have upon expansion of needed energy-oriented industries, which are water dependent.

7. Although new and amended water reservation applications (Table 2, page 5) contemplate reservations totaling 902,790 af/y, and although it is self-evident that diminution of main-stream water upstream to the confluence of the Powder and the Yellowstone Rivers would reduce, markedly, the sediment-carrying capacity of the Yellowstone River below its confluence with the Powder River, an incongruous conclusion is made: "It may be concluded that little impact would result from sedimentation."

8. The total lack of concern for economic impacts of the proposed state action totally subvert the mandate of MEPA and particularly Section 69-6504(3), R.C.M., 1947, and MAC 36-2.2(6)-P240, which require that an EIS define the economic benefits and costs of the proposed action along with an assessment of the economic costs and benefits of each alternative.

Moreover, the Addendum, the DEIS, and the FEIS totally ignore the mandate of House Joint Resolution No. 73 approved March 16, 1974, which requires:

6. UTAH INTERNATIONAL, INC.'S COMMENTS ON DRAFT ADDENDUM ENVIRONMENTAL IMPACT STATEMENT FOR WATER RESERVATION APPLICATIONS

"That all agencies of state government are hereby directed to achieve forthwith the full implementation of the Montana Environmental Policy Act including the economic analysis requirements of sections 69-6504 through 69-6514 and guidelines for fully integrated environmental and economic analysis of major actions with significant effects on the human environment; and

"BE IT FURTHER RESOLVED, that economic analysis shall accompany environmental impact statements as required by the foregoing sections of the act and shall encompass an analysis of the costs and benefits to whomsoever they may accrue, including considerations of employment, income, investment, energy, the social costs and benefits of growth, opportunity costs, and the distribution effects; and

"BE IT FURTHER RESOLVED, that the Environmental Quality Council is directed to monitor agency compliance with this resolution and to report to the 1975 Legislative Assembly the extent of agency implementation of the act's requirements for full economic analysis; and

"BE IT FURTHER RESOLVED, that the executive director and staff are directed to fully perform the duties required by section 69-6514 to give consideration to economic goals and requirements of the state in implementation of the Montana environmental policy act; and

"BE IT FURTHER RESOLVED, that copies of this resolution be sent to the Governor, the Environmental Quality Council, and all state agencies."

It is self-evident that the economic analysis mandated by the Montana Legislative Assembly has not been performed, nor is it incorporated into any of the EIS statements published to this date.

For example, "an analysis of the costs and benefits to whomsoever they may accrue, including considerations of employment,

7. UTAH INTERNATIONAL, INC.'S COMMENTS ON DRAFT ADDENDUM ENVIRONMENTAL IMPACT STATEMENT FOR WATER RESERVATION APPLICATIONS

income, investment, energy, the social costs and benefits of growth, opportunity costs, and the distribution effects" of the application requests are totally absent.

The costs of approving the water reservation applications would include the cost to the state of preventing energy-oriented industries from diverting any of the Powder River and much of the Yellowstone River main-stem water. Certainly, the costs to Utah which accrue as a result of that action are not even addressed, much less analyzed.

9. There is absolutely no evidence that the Environmental Quality Council has monitored the Department of Natural Resources and Conservation in compliance with House Joint Resolution No. 73, and thus, another state agency obviously has abdicated its responsibility in the environmental review process.

10. There is absolutely no evidence that the executive director and staff have performed the duties required by Section 69-6514, R.C.M., 1947, so as to give full consideration to the economic goals and requirements of the State of Montana.

11. On page 50, the Addendum authors again refer to deep ground water as an alternative source of water for energy-oriented industry. However, there is absolutely no credible evidence to support a thesis that there are viable ground water sources available. Indeed, the weight of the evidence supports just the opposite conclusion.

12. The entire theme of the EIS statements seems to support

8. UTAH INTERNATIONAL, INC.'S COMMENTS ON DRAFT ADDENDUM ENVIRONMENTAL IMPACT STATEMENT FOR WATER RESERVATION APPLICATIONS

subsidizing agriculture at the expense of other industries. This theme is entirely anathema to the free enterprise system. In effect, granting the irrigation scenario and/or the in-stream scenario would subsidize both of those interests with cheap water, resulting in greater energy-production costs, lower employment, and under development of Montana's coal resources.

13. The Addendum does not fulfill the requirements of Section 69-6503, R.C.M., 1947, and MAC 36-2.2(6)-P220, P230, P240, P250, and, upon information and belief, P260 in the following particulars:

- (a) The applications for reservation of water have now been supplemented by 18 federal applications for reservation and by one state agency application for reservation of water. These applications require that another draft environmental impact statement be prepared for these new applications and, contemporaneous with the filing of the applications, be made available for comment, pursuant to Section 69-6504(b)(3). No proper or complete DEIS has been published and circulated, and therefore, the environmental review process which should precede major state action has not been undertaken and renders those applications or any hearings on those applications totally void.

- (b) The agency review process on the applications submitted by the Bureau of Land Management, Bureau of Reclamation, and Little Beaver Conservation District has commenced, and the detailed statement, which has been defined as at least a draft environmental impact statement within Section 69-6504(b)(3), cannot accompany those applications through the entire agency review process.
- (c) The applications for 19 new reservations of water totally change the complexity of the overall environmental impact of the combined applications and, therefore, require that an entirely new DEIS be published and accompany all of the applications through the review process. The review process has commenced, and the DEIS has not been published or circulated. The so-called Addendum does not fulfill the requirements of statute or rule. Therefore, any hearing at this time would be in contravention of Section 69-6504, R.C.M., 1947, and MAC 36-2.2(6)-P220, P230, P240, and P250.

DATED this 12th day of July, 1977.

UTAH INTERNATIONAL, INC.,
Objector

By


One of its Attorneys

10. UTAH INTERNATIONAL, INC.'S COMMENTS ON DRAFT ADDENDUM ENVIRONMENTAL IMPACT STATEMENT FOR WATER RESERVATION APPLICATIONS

CERTIFICATE OF SERVICE

I, Urban L. Roth, one of the attorneys for Utah International, Inc., do hereby certify that on the 12th day of July, 1977, I served the foregoing UTAH INTERNATIONAL, INC.'S COMMENTS ON DRAFT ADDENDUM ENVIRONMENTAL IMPACT STATEMENT FOR WATER RESERVATION APPLICATIONS upon the following persons by depositing a true copy thereof in the United States mails, postpaid, addressed to each as follows, to-wit:

Gary Spaeth, Esq.
Attorney of Record for all
Conservation Districts (13)
32 South Ewing
Helena, Montana 59601

Woodward Wright, Esq.
Department of Fish and Game
Capitol Station
Helena, Montana 59601

John North, Esq.
Department of State Lands
Capitol Station
Helena, Montana 59601

Mona Jamison, Esq.
Department of Health and
Environmental Sciences
1400 Eleventh Avenue
Helena, Montana 59601

Manager
Buffalo Rapids Irrigation District
P. O. Box 511
Terry, Montana 59349

Richard Gordon, Esq.
Department of Natural Resources
and Conservation
32 South Ewing
Helena, Montana 59601

Mr. Paul A. Sion
Huntley Project Irrigation District
P. O. Box 61
Ballantine, Montana 59006

11. UTAH INTERNATIONAL, INC.'S COMMENTS ON DRAFT ADDENDUM ENVIRONMENTAL IMPACT STATEMENT FOR WATER RESERVATION APPLICATIONS
(CERTIFICATE OF SERVICE)

Lester H. Loble, II, Esq.
Counsel for Intake Water Co.
833 North Last Chance Gulch
P. O. Box 176
Helena, Montana 59601

James B. Goetz, Esq.
Counsel for Montana Council of Trout,
Unlimited
P. O. Box 1322
Bozeman, Montana 59715

James F. Walsh, Esq.
The Montana Power Company
40 East Broadway
Butte, Montana 59701

Robert L. Woodahl, Esq.
Counsel for The Montana Power Co.
111 North Last Chance Gulch
Arcade Bldg., Suite 4G
Helena, Montana 59601

William Madden, Esq.
Counsel for Montana Wildlife Federation
P. O. Box 1322
Bozeman, Montana 59715

Ronald F. Waterman, Esq.
Counsel for Burlington Northern, Inc.
301 First National Bank Bldg.
P. O. Box 1686
Helena, Montana 59601

W. William Leaphart, Esq.
Counsel for Montana Wilderness Association
1 North Last Chance Gulch
Helena, Montana 59601

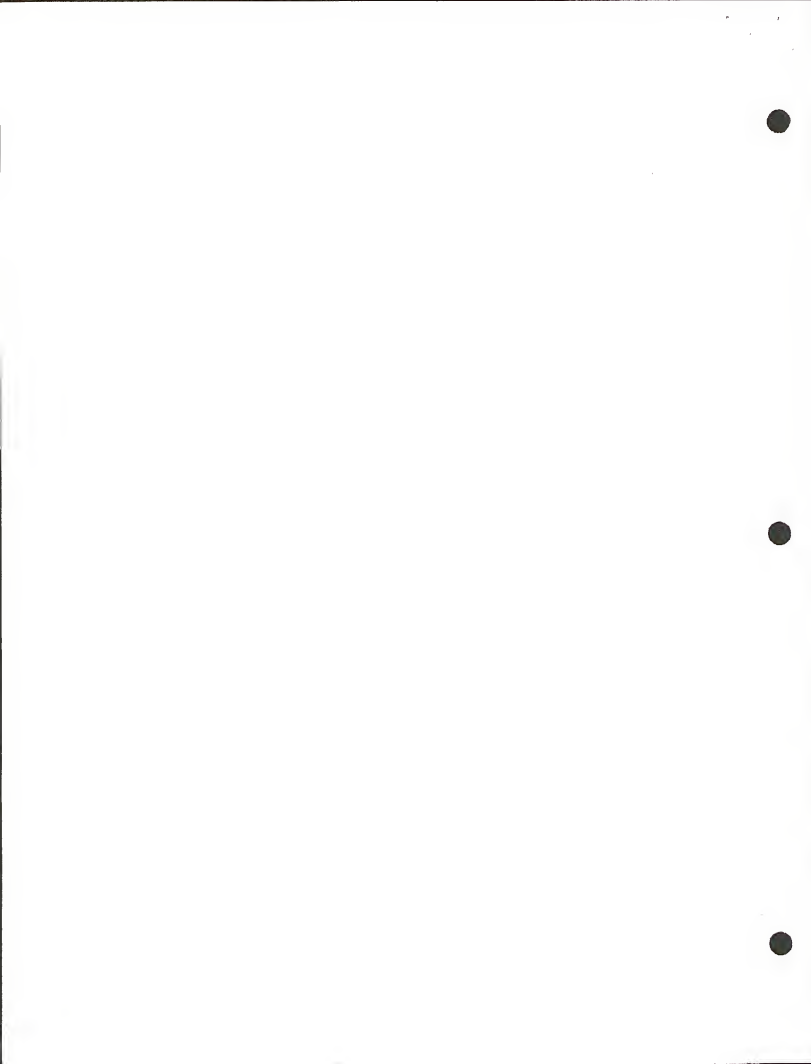
Clayton Herron, Esq.
Counsel for Department of Fish and Game
P. O. Box 783
Helena, Montana 59601

UTAH INTERNATIONAL, INC.,
Objector

By 

One of its Attorneys

12. UTAH INTERNATIONAL, INC.'S COMMENTS ON DRAFT ADDENDUM ENVIRONMENTAL IMPACT STATEMENT FOR WATER RESERVATION APPLICATIONS (CERTIFICATE OF SERVICE)



STATE OF MONTANA



DEPARTMENT OF

FISH AND GAME

Helena, Montana
July 14, 1977

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JUL 15 1977

MONT. DEPT. of NATURAL
RESOURCES & CONSERVATION

Mr. Wayne Wetzel
Environmental Coordinator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing
Helena, Montana 59601

Dear Wayne:

We reviewed the draft addendum to the Yellowstone Basin Water Reservations Environmental Impact Statement dated June 15, 1977. Basically we believe the addendum adequately discusses the impacts of the new and amended reservation applications considering current knowledge of the areas which may be impacted.

It appears that the individual impacts from each of the new and amended applications will not cause significantly different environmental impacts than were discussed in the draft EIS. However, the cumulative efforts of these applications will tend to have additional impacts on fish and wildlife ecosystems. We believe the cumulative impacts are the proper basis for discussion of the effects of water withdrawals on fish and wildlife, although we can understand that a proper discussion of impacts of individual applications was necessary in the EIS. The perpetuation of fish and wildlife in the Yellowstone Basin is contingent on maintaining adequate habitat, much of which could be reduced by the cumulative effects of new water withdrawals.

We have a few specific comments as follows:

Page 19, Table 8 shows \$200,000 benefits for recreation and fish and wildlife, however it fails to show whether these are total benefits or total annual benefits.

Page 32 - The statement is made that water would be diverted from the Yellowstone River to offstream sites during "surplus flow periods." Since diversions are slated to occur from October-March (during the critical winter period for aquatic species) it could be argued that these are not "surplus" flows because they are being used by these aquatic species during a time of year when habitat conditions stress these populations.

-Continued-

Mr. Wayne Wetzel
July 14, 1977
Page 2

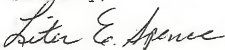
Additionally the discussion of impacts of the Bureau of Reclamation's application for the three offstream storage sites could be improved. Cumulatively the diversions could have adverse effects on the Yellowstone River which were not described. The period October 15-March 15 is the second worst time of year to divert water from the Yellowstone. Only in August would it be worse. For example, the 50 percentile flow for January at Miles City is about 5000 cfs. The proposed combined pumping rate at all three sites in January is 1520 cfs. Coupled with the ice conditions which occur in the lower river, reducing the flow by nearly one-third could cause a significant reduction in living space for aquatic organisms.

Also other possible impacts involve the release of water from offstream sites and the location of use after release. If flows are released into the Yellowstone they presumably will be diverted at a downstream site. If these sites include cross-stream diversion structures, migrations of paddlefish and shovelnose sturgeon could be blocked. Such a diversion below the mouth of the Tongue River for instance, would block the shovelnose migration into Tongue River. Such diversions could also entrap downstream migrant juveniles with subsequent loss of recruitment to fishery.

Finally, as the EIS points out, due to lack of more specific data in the operation of these projects it is unknown if releases from offstream reservoirs into the Yellowstone would benefit the river. This all depends on the quantity and time of the releases and the distance the releases travel before being diverted again.

Pages 43 and 44 - The statement on page 43 says the irrigation request on O'Fallon Creek exceeds the average streamflow in July, August and September. However, the hydrograph on page 44 shows this occurring only in August and September.

Sincerely,



Liter E. Spence
Water Resources Supervisor

LES/gk

cc: Woody Wright
Clayton Herron



United States Department of the Interior
BUREAU OF OUTDOOR RECREATION
MID-CONTINENT REGION

IN REPLY REFER TO:
D6427

MAILING ADDRESS:
Post Office Box 25387
Denver Federal Center
Denver, Colorado 80225

STREET LOCATION:
603 Miller Court
Lakewood, Colorado
Telephone 234-2634

Mr. Wayne A. Wetzel
Environmental Coordinator
Water Resources Division
Montana Department of Natural
Resources and Conservation
32 South Ewing
Helena, Montana 59601

JUL 12 1977

RECEIVED

JUL 14 1977

MONT. DEPT. OF NATURAL
RESOURCES & CONSERVATION

Dear Mr. Wetzel:

We have reviewed the Yellowstone River Basin, Draft Addendum Environmental Impact Statement for Water Reservation Applications as requested in your memorandum of June 15, 1977, and provide the following comments.

The impacts associated with all of the new and amended water reservation applications are difficult to define. It is appreciated that if an environmental statement was written for each of these proposals, the time and funds necessary to complete such a task would be inconceivable. The information supplied in this addendum does, however, point out one significant fact--recreation would be severely curtailed if all consumptive use application requests were approved.

In view of the national significance of the Yellowstone River, we recommend that consumptive withdrawals of water in the Yellowstone River Basin and its sub-basins be limited to that amount that would maintain instream flows without reduction in water quality. Any approved applications that would reduce instream flows below a desirable level for fish, wildlife, and recreation or reduce the water quality below present levels would severely affect the recreational potential of this resource.

We appreciate the opportunity to review and comment on this report.

Sincerely,

Albert G. Baldwin
Assistant Regional Director
Resource Planning Services



RECEIVED

JUL 15 1977

MONT. DEPT. OF NATURAL
RESOURCES & CONSERVATION

P. O. Box 467
Absarokee, Montana 59001
13 July 1977

Montana Department of Natural Resources and Conservation
32 South Wing Street
Helena, Montana 59601

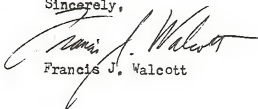
Gentlemen:

Thank you for sending me a copy of the Addendum Draft Environmental Impact Statement for Water Reservation Applications in the Yellowstone River Basin. I do have a few comments on it.

The application by the Bureau of Reclamation introduces an entirely new category of water use into the procedure now underway prior to expiration of the moratorium. If a sizeable portion of Yellowstone River Basin water were allocated to industrial uses considerable impact on the area and on current users and other applicants could be expected. This is only briefly mentioned and discussed in the Draft Addendum, and needs considerably more consideration before action on this particular application. Encouragement of industrialization through granting of the application would have effects not only on water availability for in-stream needs, agricultural uses and recreation, but would very likely affect air and water quality, and lead to pressures of increased population. All these and other resulting factors would lead to severe change in the character of the Yellowstone River basin, especially from the Billings area downstream. Full consideration of such factors should be included in the Impact Statement and in deliberations on the applications.

The other applications reviewed in the Draft Addendum offer nothing different from prior applications. Such uses as those proposed have been adequately discussed and need no further response in commenting on the Draft Addendum EIS. Thank you for this opportunity to express my views.

Sincerely,



Francis J. Walcott

BEFORE THE BOARD OF NATURAL
RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

RECEIVED

JUL 15 1977

MONT. DEPT. OF NATURAL
RESOURCES & CONSERVATION

IN THE MATTER OF APPLICATIONS FOR)
RESERVATION OF WATER NO. 1781-r,)
6294-r, 8476-r, 9442-r, 9646-r,)
9931-r, 9933-r, 9934-r, 9935-r,)
9937-r, 9938-r, 9939-r, 9940-r,)
9941-r, 9942-r, 9943-r, 9944-r,)
9945-r, 9946-r, 9947-r, 9948-r,)
9949-r, 9951-r, 9952-r, 9953-r,)
9954-r, 10,003-r, 10,004-r,)
10,005-r, 10,006-r, and)
11349-r42L&M, 12330-r42KJ,)
12331-r43Q, 12332-r42K, 12333-r43P,)
12334-01 through 12334-14.)

OFFICIAL NOTICE OF INTENT
OF INTAKE WATER COMPANY
TO PRESENT TESTIMONY AND EVIDENCE

COMES NOW Intake Water Company, one of the objectors herein,
and gives and files this official notice that it does intend to
present testimony and evidence at the hearings upon the above-
captioned applications for reservation of water. This notice is
given pursuant to the order of the hearings examiner dated May 27,
1977.

DATED this 15th day of July, 1977.

LOBLE, PICOTTE & PAULY, P.C.

By [Signature]

Attorneys for Intake Water
Company, objector

833 North Last Chance Gulch
P. O. Box 176
Helena, MT 59601

BEFORE THE BOARD OF NATURAL RESOURCES
AND CONSERVATION OF THE
STATE OF MONTANA

IN THE MATTER OF APPLICATIONS FOR)
RESERVATIONS OF WATERS NOS. 1781-r,)
9931-r, 9933-r, 9934-r, 9935-r, 9940-r,)
9953-r, 9937-r, 9938-r, 9939-r, 9646-r,)
8476-r, 9954-r, 6294-r, 9442-r,)
10003-r, 9949-r, 10006-r, 9943-r,)
9944-r, 9945-r, 9946-r, 9947-r, 9948-r,)
9951-r, 9952-r, 10004-r, 10005-r,)
9942-r, 11349-r, 12330-r, 12331-r,)
12332-r, 12333-r, and)
12334-r (01 through 14))

INTAKE WATER COMPANY'S CONSOLIDATED
OBJECTIONS TO AND COMMENTS ON THE "DRAFT ADDENDUM
ENVIRONMENTAL IMPACT STATEMENT FOR WATER
RESERVATION APPLICATIONS" IN THE YELLOWSTONE RIVER BASIN

Objector, Intake Water Company (Intake), hereby submits
its objections to and comments on the "Draft Addendum Environ-
mental Impact Statement for Water Reservation Applications"
(Draft Addendum) in the Yellowstone River Basin prepared by the
Montana Department of Natural Resources and Conservation
(DNRC) as of "June 1977".

BACKGROUND

It is necessary to set forth a summary of certain of the
important events that have occurred in these proceedings in
chronological order as they occurred at this point, and as a
preliminary to a discussion of such Draft Addendum, in order to
properly understand Intake's objections thereto and comments
thereon.

Intake has an application for a beneficial water use

permit pending before the DNRC, which was filed with the DNRC on September 27, 1974, to appropriate certain of the waters of the Powder River for irrigation, industrial, municipal and domestic purposes. (Application No. 3763-s42J) The Powder River is an interstate tributary of the Yellowstone River, which rises in the State of Wyoming and flows through the states of Wyoming and Montana until it joins the Yellowstone River near Miles City, Montana. This application contemplates the construction of a storage and diversion facility at a site commonly known as the Moorhead Dam Site.

In late 1976, (October and November), various state agencies filed thirty (30) applications to reserve waters of the Yellowstone River and its tributaries including the Powder River with the DNRC.

Intake objected to such reservation applications and, specifically, applications 9441-r, 1781-r, 9931-r, 9933-r, 9934-r, 9943-r, 9946-r, 9947-r, 10006-r, all as more fully appears from the contents of Intake's objections to and grounds for denial of such applications dated December 28, 1976, which are by this reference incorporated herein and made a part hereof as though fully set forth at this point in haec verba.

Such reservation applications included an application of the DNRC to appropriate waters of the Powder River which likewise contemplated construction of a storage and diversion facility on the Powder River at the site commonly known as the Moorhead Dam Site. (Application No. 9441-r)

A "Draft Environmental Impact Statement for Water Reservation Applications" (DEIS), purportedly covering the thirty (30) reservation applications filed by various state agencies with the DNRC in late 1976, and purportedly prepared in compliance with the provisions of the Montana Environmental Policy Act (MEPA), Title 69, Chapter 65, R.C.M. 1947 and the regulations adopted by the DNRC to implement that act, was issued by the DNRC as of "December 1976". (It was actually promulgated under cover of a letter of transmittal dated December 13, 1976.)

Intake made comments upon this DEIS all as more fully appears from its "COMMENTS UPON DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR WATER RESERVATION APPLICATIONS IN THE YELLOWSTONE RIVER BASIN" dated January 12, 1977, which are by this reference incorporated herein and made a part hereof as though fully set forth at this point in haec verba.

A "Final Environmental Impact Statement for Water Reservation Applications" (FEIS), again, purportedly covering the thirty (30) reservation applications filed by various state agencies in late 1976, and again purportedly prepared in compliance with the provisions of MEPA and the regulations adopted by the DNRC to implement that act, was issued by the DNRC as of "February 1977".

Intake objected to and commented upon this FEIS all as more fully appears from the contents of the "CONSOLIDATED OBJECTIONS AND COMMENTS OF INTAKE WATER COMPANY TO THE FINAL

ENVIRONMENTAL IMPACT STATEMENT FOR WATER RESERVATION APPLICATIONS IN THE YELLOWSTONE RIVER BASIN" dated March 3, 1977, which are by this reference incorporated herein and made a part hereof as though fully set forth at this point in haec verba.

Section 89-890, the reservation statute as originally enacted, authorized agencies of the federal government as well as agencies of the State of Montana to seek to reserve waters of this state. The Yellowstone River Moratorium Act, Section 89-8-103, et seq., as originally enacted effective March 11, 1974, which declared a moratorium on any action on certain applications for beneficial water use permits in the Yellowstone River Basin for a period of three years, (such as that of Intake for the Moorhead project), prohibited agencies of the federal government from seeking to reserve water in the Yellowstone River Basin under Section 89-890 during the period of such moratorium.

On February 14, 1977, and on a date subsequent to the issuance of the aforementioned DEIS and FEIS, the Little Beaver Creek Conservation District filed an application with the DNRC to reserve 25,546 acre-feet per year of the waters of the Yellowstone River or its tributaries for irrigation purposes. (Of course, this application was not one of the thirty (30) reservation applications which were purportedly the subject matter of the aforementioned DEIS and FEIS.)

On March 11, 1977, the DNRC withdrew its application to reserve waters of the Powder River for a storage and diversion facility at the Moorhead Dam Site, (formerly application No.

9441-r), an application which was one of the applications purportedly covered by the aforementioned DEIS and FEIS. (Accordingly, this action left twenty-nine of the thirty original reservation applications filed in late 1976 pending.)

These two events standing alone, ignoring for the moment all of the other deficiencies found in the DEIS and FEIS, render the same, and each of them, totally inefficacious, obsolete, inadequate and valueless as a matter of fact and law.

In the spring of 1977, the 45th Legislative Assembly of the State of Montana enacted House Bill No. 310 as Chapter 26 of the Session Laws of 1977, effective on passage and approval on March 9, 1977, amending the Yellowstone River Moratorium Act so as to extend the term of that moratorium until at least January 1, 1978. It also enacted House Bill No. 664 as Chapter 416 of the Session Laws of 1977, effective on passage and approval on April 18, 1977, which, in pertinent part, amended Section 89-8-107 of the Yellowstone River Moratorium Act so as to expressly permit agencies of the federal government to apply for reservations of water in the Yellowstone River Basin under Section 89-890, the reservation statute, during the term of such moratorium as extended under House Bill No. 310.

This action precipitated a flurry of activity on the part of certain federal agencies. In May of this year, the Bureau of Land Management and the Bureau of Reclamation filed eighteen (18) additional applications to reserve water under Section 89-890 in the Yellowstone River Basin on behalf of the federal government.

In addition, on May 24, 1977, four of the conservation districts that filed applications to reserve water in late 1976, namely, the Powder River, North Custer, Prairie County and Dawson County Conservation Districts filed amendments to their applications with the DNRC as originally filed, in each instance, substantially increasing the quantity of water requested and substantially enlarging the acreage to be irrigated thereby.

As a consequence of all of the foregoing, there are some forty-eight (48) different, and in some if not all instances, conflicting applications of various state agencies, conservation districts, and federal agencies to reserve waters of the Yellowstone River and its tributaries now pending in these proceedings and one major application, that of the DNRC for a storage diversion facility at the Moorhead Dam Site has been withdrawn. (While the DNRC characterizes the new applications as six in number, they are in point of fact nineteen in number hence the total of forty-eight applications just mentioned.)

In light of this state of affairs, we submit that it became obvious to the DNRC that the existing DEIS and FEIS were inadequate.

For this reason, the DNRC issued a "Draft Addendum Environmental Impact Statement for Water Reservation Applications" in the Yellowstone River Basin as of "June 1977" under cover of a letter dated June 15, 1977. It is this Draft Addendum which is the subject matter of these objections and comments.

On June 20, 1977, and following issuance of the afore-

mentioned Draft Addendum, Intake filed certain motions in these proceedings, all as more fully appears from the contents of the "CONSOLIDATED MOTIONS OF OBJECTOR, INTAKE WATER COMPANY, TO QUASH, VACATE AND SET ASIDE HEARING EXAMINER'S ORDERS OF MAY 25, 1977, AND MAY 27, 1977, AND TO STRIKE AND EXPUNGE PURPORTED 'DRAFT ADDENDUM ENVIRONMENTAL IMPACT STATEMENT' DATED JUNE, 1977", which are by this reference incorporated herein and made a part hereof as though fully set forth at this point in haec verba.

Finally, as if there is no end to the "Catch 22" aspect of these proceedings which require, apparently of necessity, endless rounds of motions, exceptions, objections, comments, etc., directed to the applications, environmental impact statement and these proceedings, all seemingly to no avail, because of the obstinate almost unreasoning desire of those in control of these proceedings to proceed to hearing without regard to the consequences of doing so on the state of the record. Intake filed objections to all of the applications presently pending pursuant to Order of the Hearing Examiner made and entered herein on May 25, 1977, as well as a motion to dismiss such applications, all as more fully appears from the contents of Intake's "MOTION TO DISMISS APPLICATIONS FOR WATER RESERVATIONS" and the "OBJECTIONS OF INTAKE WATER COMPANY TO APPLICATIONS FOR WATER RESERVATIONS" dated and filed with the DNRC on July 11, 1977, which are by this reference incorporated herein and made a part hereof as though fully set forth at this point in haec verba.

We will now proceed to a discussion of Intake's objections to and comments upon the Draft Addendum in question. While some of these remarks will be characterized as objections to such addendum and some as comments upon such addendum, the terms are used interchangeably to the extent that the objections to such addendum constitute comments on the same and the comments upon such addendum constitute objections to the same.

OBJECTIONS TO DRAFT ADDENDUM

1. The grounds for the objections to the Draft Addendum as set forth in the aforementioned motion to "strike and expunge" are of such a serious nature that they are herein again set forth:

"1. It is unintelligible, whether considered alone or in the context of the previous DEIS and FEIS.

2. Although it states in the preface or preamble thereof that it was prepared in compliance with the Montana Environmental Policy Act, Section 69-6504(b)(3), R.C.M. 1947, it fails utterly to comply therewith.

3. It has been served and filed herein in violation of this Department's own Regulations 36-2.2(6)-P250(2)(c) and 36-2.2(6)-P240(5)(a), (b), (c), (d) and (e), MAC, in that:

(a) An 'addendum' is permitted only at the draft EIS stage or proceedings and this proceeding has progressed, albeit improperly, beyond that stage.

(b) It if is intended as a draft EIS, then said purported 'DRAFT ADDENDUM (EIS)' has been served and filed at a time when it was and is impossible to comply with and allow the time periods for various matters required by said Regulations, including but not limited to times provided for transmittal of draft EIS to the Governor, EQC, appropriate state and

federal agencies, applicants and other parties, making and filing of comments thereon, preparation, filing and service of final EIS, transmittal of same to Governor, EQC and others, comments thereon, service and transmittal of same, etc., etc.

(c) It does not and cannot suffice as a draft EIS.

(d) A draft addendum EIS is a document unknown to and not contemplated by MEPA or any regulations implementing MEPA, and particularly the regulations above specified.

(e) It is denominated an addendum, but it is not made 'a part of the draft EIS' as required by said Regulation 36-2.2(6)-P250(2) (c).

4. It is incompetent, irrelevant and immaterial, under the applicable statutes and regulations, for any purpose herein.

5. It injects additional uncertainty and procedural chaos into these already improper, confused and void proceedings, and thus burdens Intake, the Department, the Board, the applicants, the objectors and the taxpayers with further burdensome and outrageous expense and loss of time.

6. It opposes and vexes the public policy and interest by exacerbating the chaos and confusion already present herein, and does so without even a scintilla of legal basis."

By way of further amplification, a careful reading of MAC 36-2.2(6)-P250, the addendum regulation, in its entirety, reveals that an addendum can only be prepared where there is an "existing EIS". MAC 36-2.2(6)-P250, subsection (2) provides, in pertinent part, as follows:

"The Department shall, to the fullest extent possible, adopt and incorporate by reference as part of a draft EIS all or any part of the information conclusions, comments and responses to comments contained in an existing EIS which has been previously or is being contemporaneously prepared. . . . if:

(a) the Department determines that the existing EIS covers an action paralleling or closely related to the action proposed to be taken by the Department of Board;

(b) the Department determines, on the basis of its own independent evaluation, that the information, conclusions and responses to comments contained in the existing EIS, which are to be adopted and incorporated by the Department as a part of its draft EIS, have been accurately, fully and fairly gathered and presented; and

(c) the Department determines that the information, conclusions, and responses to comments which will be incorporated in the draft EIS are applicable to the action currently being considered. The existing EIS, or portions adopted or incorporated by reference, shall be circulated as a part of the draft EIS and treated as part of the draft EIS for all purposes, including, if required, preparation of a final EIS. . . .

. . . If all or any part of an existing EIS is adopted and incorporated by reference, then an addendum shall be prepared by the Department as a part of the draft EIS. . . ."
(Emphasis supplied)

We have progressed far beyond the stage of formulation of a draft environmental impact statement here which is the only point in time that it is appropriate to formulate an addendum to an environmental impact statement. Even in such a situation, the just-quoted regulation contemplates an addendum only in a situation in which the underlying "existing EIS" is adequate, which is clearly not the case here!

We are not dealing at this time with an action paralleling or closely related to the action to be taken at the time of formulation of the DEIS or the FEIS. One major application has been withdrawn, four applications have been substantially

amended and nineteen new applications have been filed, completely altering the situation as it existed at the time the DEIS and FEIS were prepared.

Clearly, in light of Intake's objections to and comments on the DEIS and FEIS earlier discussed, it cannot be said that the information contained in the DEIS and FEIS was "accurately, fully and fairly gathered and presented". Any "independent evaluation" on the part of the DNRC to the effect that it was "accurately, fully and fairly gathered and presented" constitutes a wholly unreasonable, arbitrary and capricious exercise and abuse of discretion on the part of the DNRC and a denial of due process to Intake.

2. Assuming MAC 36-2.2(6)-P250, the addendum regulation, allows the promulgation of an addendum in the instant situation, subsection 3 thereof, provides that: ". . . The same time periods specified in MAC 36-2.2(6)-P240 shall apply to the circulation and review of an addendum. . . ." While the Draft Addendum was promulgated allowing thirty (30) days for comment on the same, MAC 36-2.2(6)-P240, (5)(a), it is obvious that there is not sufficient time to permit formulation of a Final Addendum to such Draft Addendum and to permit circulation and review of such Final Addendum within the times specified in MAC 36-2.2(6)-P240, (5)(b), (c), (d) and (e) in view of the short period of time remaining before this matter is scheduled to go to hearing.

3. While MAC 36-2.2(6)-P242(2)(a) provides that ". . . A draft statement may satisfy the requirement for a final environ-

mental impact statement. . . .", based on the objections and comments contained herein, it would be a grossly arbitrary, capricious and unreasonable exercise and abuse of discretion for the DNRC to determine that the Draft Addendum involved here suffices for a final environmental impact statement. Such a determination would work a denial of due process to Intake and the other parties to this proceeding.

In any event, no such determination could be made by the DNRC until fifteen (15) days after the DNRC has sent ". . . copies of all comments on the (Addendum) DEIS to the parties listed in subsection (2) of MAC 36-2.2(6)-P240." (Emphasis and parentheses supplied.) See MAC 36-2.2(6)-P240(2)(b). This could not occur until fifteen days after July 15, 1977, the date the period of time allowed for comments on the Draft Addendum closes. Thus, such a determination could not be made until July 30, 1977 only one week prior to the point in time this matter is scheduled for hearing.

If the DNRC determines that the Draft Addendum in question here satisfies the requirements for a Final Addendum, as just discussed, the DNRC is to ". . . include with the comments, notice of the Department's decision not to prepare a final EIS and a statement describing the Department's or Board's proposed course of action. The applicant whose project is being evaluated by the Department may request an extension of this period in order to respond to the written comments that have been received." See MAC 36-2.2(6)-P240(2)(b). How can all this be done, assuming

the Draft Addendum suffices for a Final Addendum, in such a manner as to accord the parties to this proceeding due process and a fair hearing bearing in mind that this matter is scheduled for hearing on August 8, 1977.

4. MAC 36-2.2(6)-P240(5)(c) provides that ". . . no action which requires the preparation of an environmental impact statement shall be taken sooner than sixty (60) days after the transmittal date to the Governor and the EQC of the draft environmental impact statement." There is no clear indication of the date the Draft Addendum was transmitted to the Governor and the EQC. We are presently scheduled, however, to go to hearing in this matter before such sixty day period expires assuming the Draft Addendum was transmitted to the Governor and the EQC on June 15, 1977.

5. If it is determined that a Final Addendum is necessary, MAC 36-2.2(6)-P240(5)(d) provides that ". . . no Board or Department action shall be taken sooner than thirty (30) days after the final environmental impact statement has been transmitted to the Governor and the EQC." This provision obviously contemplates a thirty (30) day period for comment on the final environmental impact statement or, as in the instant case the Final Addendum, after it has been promulgated. This is an obvious impossibility here if we are to proceed to hearing in this matter on August 8, 1977.

6. Under MAC 36-2.2(6)-P240(5)(b) and (e), applicants are allowed a "reasonable time" to respond in writing to the comments on a Draft and Final EIS. Apparently, no provision will be made for such responses to the Draft Addendum or any Final

Addendum that is prepared as required by these regulations all in flagrant disregard of their mandatory requirements. While an applicant can "waive his right to respond", we submit that such waiver defeats the purposes of MEPA. The applicants should respond.

7. The preamble dated June 15, 1977 to the Draft Addendum of June, 1977, states that "This Addendum Draft EIS was prepared in compliance with the Montana Environmental Policy Act, Section 69-6504(b)(3), R.C.M. 1947." The Draft Addendum totally fails to comply with Section 69-6504(b)(3) of MEPA in that it:

- (a) Is not a detailed statement on the environmental impact of the proposed actions,
- (b) Does not disclose all adverse environmental affects which cannot be avoided should the proposals be implemented.
- (c) Does not purport to exhaust the various alternatives to the proposed actions,
- (d) Does not present a detailed statement of the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (e) Does not present a detailed statement on the irreversible and irretrievable commitments of resources which would be involved in the proposed actions should they be implemented.

The Draft Addendum totally fails to comply with the MAC 36-2.2(6)-P200 in that it fails to fulfill the policy and purposes of MEPA and fails to comply with MEPA "To the fullest extent possible."

The Draft Addendum discusses applications for reservations which will require the acquisition of large land areas, together with rights-of-way through other land areas. Nevertheless, the Draft Addendum fails to touch upon or discuss a plan of acquisition for obtaining lands which will be submerged by projects contemplated under such applications or through which ditches, roads, pipelines, aqueducts, conduits, and rights of egress and ingress run.

The Draft Addendum fails to touch upon or treat the subject of who owns the lands which will be inundated by the DNRC's proposed project on the Tongue River nor the lands which will be affected by projects proposed by the amendments to the conservation and irrigation district applications nor the lands which will be affected by the applications of the federal government.

The Draft Addendum does not discuss whether or not the present owners of lands which will be inundated by any of the projects which contemplate the construction of storage or affected by other projects are willing to sell their lands for the purpose of the project or grant to the applicant agencies easements, leases, or rights-of-way upon or through their lands for the purpose of constructing the various facilities contemplated by applicant projects or whether the land owners involved

are opposed to such development and/or use of their lands.

The Draft Addendum fails to state the statutory basis upon which the applicant agencies can legally fund the construction of their proposed projects.

The Draft Addendum fails to cite the legal basis upon which the applicants predicate their right and power to construct the proposed project.

The Draft Addendum does not assist one, and particularly the Board of Natural Resources and Conservation, to make a true environmental analysis of the various major state actions proposed nor sufficiently treats, pursuant to MEPA criteria, their environmental impacts. Thus, the Draft Addendum totally lacks the environmental leadership which should be exemplified therein.

The Draft Addendum totally fails to set forth the methods by which environmental impacts caused by the proposed actions purportedly discussed therein can be mitigated.

The Draft Addendum totally fails to set forth alternatives for lessening environmental impacts while still accomplishing the projects proposed by the applicants.

The Draft Addendum totally fails to reflect what the people inhabiting the area affected by the various projects discussed therein want as an alternative to the proposed actions.

The Draft Addendum totally fails to provide the Board of Natural Resources and Conservation the necessary information it must have to determine what the environmental impacts of the proposed actions will be.

The Draft Addendum totally fails to adequately treat the subject of private development of the proposed projects and assess in that light the fact there will be no initial cost to the state and upon completion of the projects, there will be an addition of tax dollars to the state by virtue of accomplishment of any such projects through private development.

The Draft Addendum does not state that the DNRC and the Board of Natural Resources and Conservation have the right to assess environmental impacts of individual, non-state agency actions having a significant affect upon the environment. Thus, the Draft Addendum leaves a totally false impression that if non-government agencies constructed projects similar to those proposed by the various governmental applicants, no environmental appraisal or reappraisal of the projects would be conducted.

The Draft Addendum totally fails to adequately consider the archaeological, historical, recreation, aesthetic, municipal and domestic impacts of the applications discussed in the Draft Addendum.

The Draft Addendum totally fails to use the information which is reasonably available to assess the economic and environmental costs and benefits of each alternative. The Draft Addendum totally fails to make a comparison of short-term costs and benefits with the effects on maintenance and the enhancement of the long-term productivity of the environment.

8. MAC 36-2.2(6)-P250(2)(c) specifies that an addendum "shall include as a minimum", (emphasis supplied), the following:

"(i) A description of the specific action to be taken;

(ii) Any impacts, alternatives, or other items that would be different from those in the original statements;

(iii) Any impacts, alternatives, or other items that were not covered in the original statement; and

(iv) A discussion of the points of disagreement with the previous EIS, if any. If there are no points of disagreement the Department shall take full responsibility for the contents of the previous EIS."

The Draft Addendum totally fails to give an adequate description of the specific action to be taken. It does not adequately treat any impact, alternative, or other items that could be different from those in the original statement. It contains a totally inadequate discussion of any impact, alternatives or other items that were not covered in the original statement. Any discussion of the points of disagreement with the previous EIS is virtually non-existent.

COMMENTS ON DRAFT ADDENDUM

1. The Draft Addendum is factually and legally inaccurate, insufficient and inadequate.

2. The "INTRODUCTION" to the Draft Addendum contains an inaccurate and incomplete statement of the law applicable to reservations. It makes no reference to the rules and regulations adopted by the DNRC to implement Section 89-890, R.C.M.

1947, the reservation statute, set forth in Title 36, Chapter 14, Sub-chapter 1, MAC, which establish criteria and standards to be applied in considering reservation applications in addition to the statutory criteria enunciated in Section 89-890, R.C.M. 1947. Further, it makes no mention of the criteria and standards for an addendum, which are mandatory, as set forth in MAC 36-2.2(6)-P250(2)(c).

Intake takes exception to the statement contained in the "INTRODUCTION" to the Draft Addendum, at page 1 thereof, to the effect that "A water reservation, when adopted, becomes a water right." No mention is made of the fact that reservations, once approved, are subject to review at least once every ten (10) years. The Draft Addendum, while recognizing that reservations may be extended or modified, fails to point out that reservations may also be revoked. It thus leaves the false and erroneous impression that reservations may be perpetual in nature and somehow sacrosanct. In point of fact, an order reserving water merely places the water so reserved in the realm of limbo and makes it unavailable for appropriation by others.

3. In the "INTRODUCTION" to the Draft Addendum, under the sub-title "NEW AND AMENDED APPLICATIONS", at page 4 thereof, a statement is made to the effect that the new and amended applications are summarized in Table 2 of the Draft Addendum found at page 5 thereof. The listing of new applications of the Bureau of Land Management does not include the 200 cubic feet per second of instream flow (144.800 af/y) requested by that agency on the Powder River.

4. Further, under the sub-title "NEW AND AMENDED APPLI-CATIONS", at page 5 of the Draft Addendum, all of the Bureau of Land Management applications are lumped together. The Draft Addendum totally fails to define the sources from which the applications reserve water and the specific geographical areas within which the reservations will have an environmental impact. Therefore, it totally fails to even identify the geographical locations of the applications so that an intelligent assessment of environmental impacts can be made. Subsequent references to BLM applications only tend to confuse and obfuscate, rather than clarify and define.

5. In the preamble dated June 15, 1977, to the Draft Addendum of June, 1977, the statement is made that "The addendum is necessary to consider additional impacts of new and amended water reservation applications not evaluated in the previously distributed Draft and Final Environmental Impact Statements." It is also necessary to consider the impacts arising from the DNRC's withdrawal of its application to reserve waters of the Powder River for a storage and diversion facility to be constructed at the Moorhead Dam Site on the Powder River. (Application No. 9441-r)

6. At page 6 in the "INTRODUCTION" to the Draft Addendum, an attempt is made to explain the "NATURE OF THIS ADDENDUM". There the following statement is found.

"This addendum to the Draft and Final EIS's addresses the cumulative impacts of additions and changes to those water reservation applications considered

previously. As an addendum, it adopts the Draft and Final EIS's in their entirety, excepting any specific changes from the original documents made in this addendum. Referral to those documents is necessary for a complete understanding of this addendum."

The Draft Addendum is incomprehensible even when read in the context of the DEIS and the FEIS. One is unable to fully comprehend the environmental significance of the various applications discussed in the Draft Addendum even with assistance of the DEIS and FEIS. The Draft Addendum should be completely understandable on its own.

7. On page 11 of the Draft Addendum, while discussing the Powder River Conservation District application, the statement is made that "According to the application, the conservation district has identified 4,120 additional acres within the county which, considering both engineering and economics, should become feasible for future water spreading using the Powder River as a source of supply." Such engineering and economic feasibility should be shown in these applications or they should be rejected. The same comment applies to the North Custer and Prairie County Conservation Districts applications. There is no indication in the Draft Addendum that there is the requisite showing of engineering and economic feasibility in such applications.

8. The blatant inadequacy of the Draft Addendum from the standpoint of its consideration and treatment of the environmental impacts of withdrawal of the DNRC's application for waters of the Powder River for the Moorhead project is shockingly

apparent if one puts it all together. This is all that is said:

"One application, DNRC's request on the Powder River involving construction of Moorhead Dam, has been withdrawn following additional feasibility studies which showed that water quality problems would probably result from building Moorhead Dam and from the depleted streamflows which would result. (Draft Addendum, p. 4)

* * * *

. . . DNRC's application, which involved the building of Moorhead Dam, has been withdrawn; however, implementation of the Powder River and North Custer conservation districts' applications would require a large amount of water storage on the Powder River. (Draft Addendum, p. 14)

* * * *

In addition, the DNRC withdrew its water reservation application for the Powder River. (Draft Addendum, p. 15)

* * * *

Environmental Impacts--DNRC Withdrawal of Powder River Application

Withdrawal of the DNRC water reservation will not affect development in the Powder River Basin. The Powder River and North Custer conservation districts assume storage on the Powder River to satisfy a portion of their water reservation requests. While it is doubtful that those conservation districts could construct a project the size of the Moorhead Reservoir, they could perhaps purchase water if a federal water development agency built a project similar to Moorhead Reservoir.

Environmental effects due to DNRC's construction of the Moorhead Project (see p. 177 of the Draft EIS) will not occur; however, similar effects would occur if private or federal entities were to build a similar project. (Draft Addendum, p. 21)

* * * *

POWDER SUBBASIN

Withdrawal of the DNRC application for Moorhead does not ease the incompatible nature of requests in the Powder Subbasin, since fulfillment of the conservation district applications there would require construction of a large water storage project. The BLM minimum flow request furthers the incompatibility of applications in that subbasin." (Draft Addendum, p. 57)

It is astonishing that the Draft Addendum can conclude that the withdrawal of the DNRC water reservation will not affect development in the Powder River Basin in light of the fact that the various applications of the conservation districts on the Powder River assume that storage will be constructed on that river. The statement that it is "doubtful" that those conservation districts could construct a project the size of the Moorhead Reservoir, but they could "perhaps" purchase water if a federal water development agency built the project points up the singularly speculative nature of the applications of the conservation districts. Yet, there is no discussion of the speculative nature of these applications if the Moorhead project is not constructed and the environmental impacts of granting the conservation district applications without construction of the Moorhead Reservoir.

9. At page 23 of the Draft Addendum under "BUREAU OF LAND MANAGEMENT" there is the indication that "21,298 af/y for irrigation was included in the BLM request (Table 12)." An examination of Table 12, which is found at page 28 of the Draft Addendum, shows that 21,498 acre-feet per year are requested. These numbers should agree.

10. Again on page 23 of the Draft Addendum under the discussion of "PRIMARY IMPACTS" and "STREAMFLOW ALTERATIONS" of the BLM applications, the following statement is made, "The supply in these streams is generally adequate to serve the needs of the proposed projects without causing significant streamflow alterations." This statement is made only in the context of the requirements of the BLM applications. It does not take into consideration the applications of other applicants. As a consequence, it is entirely misleading and inaccurate.

11. The discussion of water quality in the context of the BLM reservation request for irrigation found at page 28 of the Draft Addendum is a very perfunctory examination of potential impacts on water quality. It should be expanded to include specific instances of overgrazed range land or dry farmland, and an analysis of irrigation return flows.

12. The following astonishing statement is found on page 28 of the Draft Addendum in the course of the discussion of the "SECONDARY IMPACTS" of a socioeconomic nature of the BLM reservation request for irrigation.

"Under irrigation, the production capacity of the lands would increase. However, the reservation application did not estimate the irrigation cost for these lands. Therefore, a comparison of benefits and costs cannot be made." (Emphasis supplied)

In view of this statement, there is no basis on which to process much less grant the reservation requested under the applicable statutes and regulations.

13. On page 47 of the Draft Addendum, the authors of that document purport to delimit the cumulative impacts of granting consumptive use reservation requests. However, nowhere under the primary or secondary impacts, are listed any of the economic impacts of granting consumptive use applications, which, if granted, with particular reference to the Powder River Subbasin, will preclude development of water for beneficial use for industrial purposes in any substantial quantity.

14. Table 20, at page 48 of the Draft Addendum, purports to be a listing of the "CUMULATIVE CONSUMPTIVE USE APPLICATIONS". If one totals the acreages and volumes of water set forth in the summary of filings at pages 2, 3 and 5 of the Draft Addendum, the numbers in Table 20 cannot be duplicated. The numbers in Table 20 appear to reflect lesser acreages and volumes of water than were requested in the consumptive use applications.

15. There is absolutely no assessment of the effect that the approval of the reservation requests involved here would have upon the development of water by persons or entities other than the conservation districts, state and federal agencies involved here.

16. On page 49 of the Draft Addendum, under "SECONDARY IMPACTS", in discussing "Agriculture Water Use", the perfunctory analysis does not present adequate information as to whether or not to grant the agricultural applications.

17. A comparison of statements made at various points between pages 47-59 of the Draft Addendum only leave the reader hopelessly befuddled.

At page 47, under "CUMULATIVE APPLICATIONS AND ASSOCIATED IMPACTS", the following statement is found:

"From the discussions of water availability presented in the Draft EIS, Volume I, Part III, it is apparent that not all water reservation applications can be approved. There is not enough water to fully satisfy all applicants in aggravated by the unquantified existing rights (including Indian and federal reserved water) and by Wyoming's share of the four interstate tributaries. The conflict is primarily between instream and consumptive uses. Although there are a few exceptions, approval of each consumptive use request would not adversely affect any diversionary application. Likewise, all instream use applications could be approved since those applications are not in conflict with one another."

On the same page, under "CUMULATIVE CONSUMPTIVE USE APPLICATIONS", it is said that, "It is possible to approve the consumptive use applications without significant adverse impacts on water supply for other consumptive requests."

On page 55, under "CUMULATIVE INSTREAM APPLICATIONS", it is said, "Granting one instream flow application would not adversely affect another instream reservation. Therefore, all instream requests, including the BLM request, could be approved."

Yet, on page 57, under "MUTUAL EXCLUSIVENESS OF RESERVATION APPLICATIONS", the following statement is made:

"Despite an apparently abundant water supply, the Yellowstone Basin does not produce enough water to satisfy the demands of all users. In general, potential consumptive users could all be accommodated. But all demands for consumptive and instream users cannot be met at the same time."

Where does all this leave us? Apparently the Board of Natural Resources and Conservation can grant all consumptive uses

or all instream uses, but it cannot grant all of both. This answer begs the ultimate question which is: What applications, if any, should be granted?

There is no adequate discussion in the Draft Addendum or for that matter the DEIS and FEIS of the specific environmental impacts stemming from approval of specific applications or specific alternative combinations of applications.

The Draft Addendum disposes of this problem in the following manner at page 59.

" . . . In many cases there is an adequate supply of water to satisfy competing applicants, in some cases, not.

For each of 34 reservation applications, there are a number of conceivable alternatives. Any attempt to formulate and compare the impacts of all possible alternatives would quickly lead to an incomprehensible array of duplicative information. The Draft EIS presented a set of general alternatives, representing the range of options available and the impacts of those alternatives, with as much detail as possible."

We submit that this will not suffice. As we have repeatedly urged, the environmental impact statement involved here should be site specific. This is true of the Draft Addendum too. The feasibility of each specific application and any potential combination of applications should be considered. This is the only way to make a rational decision in these proceedings. The analysis presented in the DEIS, FEIS, and the Draft Addendum will only leave the Board of Natural Resources and Conservation hopelessly confused as they did this author.

18. The statement found in the first paragraph on page 47 of the Draft Addendum to the effect that the water situation is "further aggravated" by the unquantified Indian and federal reserved waters and "by Wyoming's share of the four interstate tributaries" is an understatement to say the least. The Draft Addendum is totally deficient in its consideration of the applications discussed therein in that it totally ignores the allocations of the waters of the Yellowstone and its tributaries, such as the Powder River, under the Yellowstone River Compact.

19. The total lack of concern for economic impacts of the proposed state action totally subverts the mandate of MEPA and particularly Section 69-6504(3), R.C.M. 1947, and MAC 36-2.2(6)-P240, which require that an EIS define the economic benefits and costs of the proposed action along with an assessment of the economic costs and benefits of each alternative.

Moreover, the Draft Addendum, the DEIS and the FEIS totally ignore the mandate of House Joint Resolution No. 73 approved March 16, 1974, which requires:

"That all agencies of state government are hereby directed to achieve forthwith the full implementation of the Montana Environmental Policy Act including the economic analysis requirements of sections 69-6504 through 69-6514 and guidelines for fully integrated environmental and economic analysis of major actions with significant effects on the human environment; and

BE IT FURTHER RESOLVED, that economic analysis shall accompany environmental impact state-

ments as required by the foregoing sections of the act and shall encompass an analysis of the costs and benefits to whomsoever they may accrue, including considerations of employment, income, investment, energy, the social costs and benefits of growth, opportunity costs, and the distribution effects; and

BE IT FURTHER RESOLVED, that the Environmental Quality Council is directed to monitor agency compliance with this resolution and to report to the 1975 Legislative Assembly the extent of agency implementation of the act's requirements for full economic analysis; and

BE IT FURTHER RESOLVED, that the executive director and staff are directed to fully perform the duties required by section 69-6514 to give consideration to economic goals and requirements of the state in implementation of the Montana environmental policy act; and

BE IT FURTHER RESOLVED, that copies of this resolution be sent to the Governor, the Environmental Quality Council, and all state agencies."

It is self-evident that the economic analysis mandated by the Montana Legislative Assembly has not been performed, nor is it incorporated into any of the EIS statements published to this date.

For example, "an analysis of the costs and benefits to whomsoever they may accrue, including considerations of employment, income, investment, energy, the social costs and benefits of growth, opportunity costs, and the distribution effects" of the application requests are totally absent.

CONCLUSION

As a result of the withdrawal of the DNRC application for the Moorhead project, the substantial amendments to four of the original thirteen conservation district applications, the filing of the Little Beaver Creek Conservation District application, and the eighteen applications of the Bureau of Land Management and Bureau of Reclamation, there are now forty-eight (48) applications pending.

These events totally change the picture. They require that an entirely new draft environmental impact statement and final environmental impact statement be published and accompany all of the applications through the agency review process.

It is too late to resort to a Draft Addendum. In any event, the so-called Draft Addendum does not comply with the requirements of the statutes or rules and, specifically, Sections 69-6503 and 69-6504, R.C.M. 1947 and MAC 36-2.2(6)-P220, P230, P240 and P250.

One is led to one inescapable conclusion, no proper or complete DEIS and FEIS has been published and circulated, and therefore, the environmental review process which precedes major state action has not been lawfully and properly undertaken. The applications are void and any hearings on the applications will be a nullity until this is done.

DATED this 15th day of July, 1977.

LOBLE, PICOTTE & PAULY, P. C.

By 

Attorneys for Intake Water
Company

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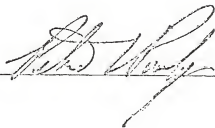
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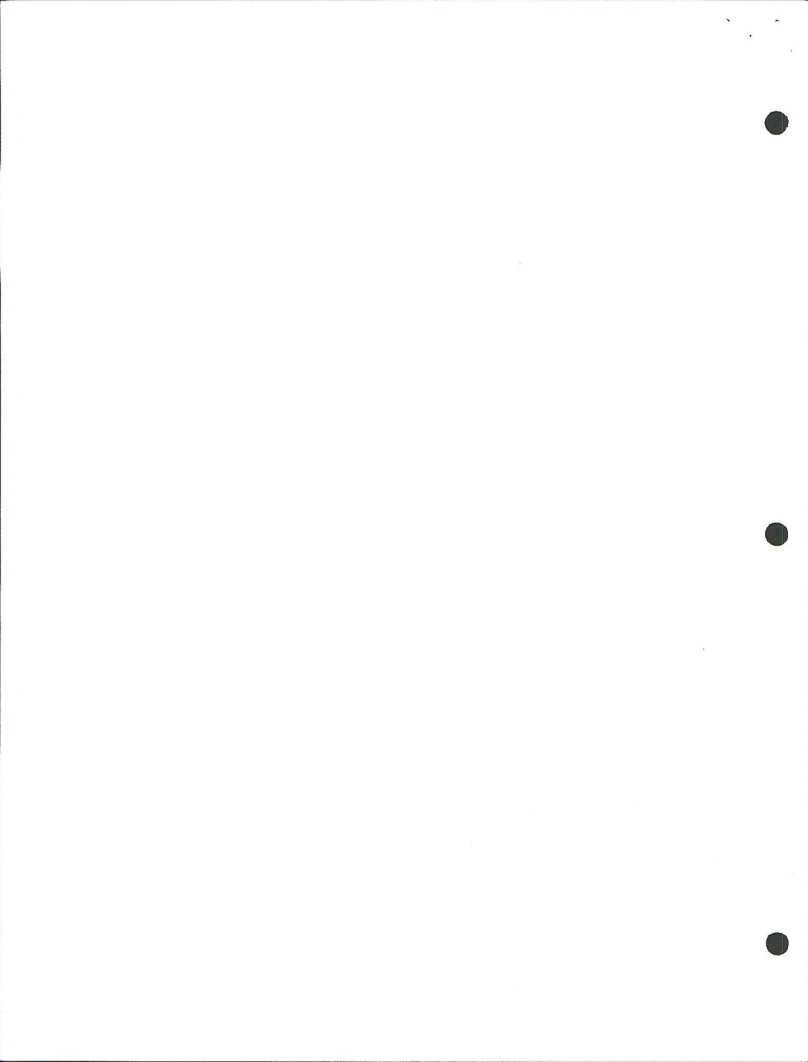
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I further certify that I caused copies of the within and foregoing document to be hand delivered to the offices of James M. Driscoll of the law firm of Hull & Driscoll at their offices located at 111 East Sixth, P. O. Box 534, Helena, Montana, and the offices of the Department of Natural Resources and Conservation at 32 South Ewing, Helena, Montana.

DATED this 15th day of July, 1977.





BEFORE THE BOARD OF NATURAL
RESOURCES AND CONSERVATION OF THE
STATE OF MONTANA

IN THE MATTER OF APPLICATIONS FOR)	OBJECTOR, THE MONTANA
RESERVATION OF WATER NO. 1781-r)	POWER COMPANY'S COMMENTS
6294-r, 8476-r, 94442-r, 9646-r,)	ON DRAFT ADDENDUM ENVIRON-
9931-r, 9933-r, 9934-r, 9935-r,)	MENTAL IMPACT STATEMENT
9937-r, 9938-r, 9939-r, 9940-r,)	FOR WATER RESERVATION
9941-r, 9942-r, 9943-r, 9944-r,)	APPLICATIONS
9945-r, 9946-r, 9947-r, 9948-r,)	
9949-r, 9951-r, 9952-r, 9953-r,)	
9954-r, 10,003-r, 10,004-r,)	
10,005-r, 10,006-r, and)	
11349-r42L&M, 12330-r42KJ,)	
12331-r43O, 12332-r42K, 12333-r43P,)	
12334-01 through 12334-14.)	

Pursuant to the Montana Environmental Protection Act, the Montana Water Use Act, the Montana Administrative Procedures Act, and the Montana Administrative Code, the Montana Power Company, ("MPC"), an Objector to the instant reservations, hereby submits its Comments to the Draft Addendum Environmental Impact Statement ("EIS") for Water Reservation Applications in the Yellowstone River Basin prepared by the Montana Department of Natural Resources and Conservation, Water Resources Division ("DNRC"), a copy of which was received by the undersigned attorney for MPC on June 20, 1977.

1. MPC incorporates by reference and in haec verba its Comments to the Draft Environmental Impact Statement ("DEIS") and the Final Environmental Impact Statement ("FEIS").

2. Discussion of the environmental impacts of the Bureau of Land Management's irrigation requests (application numbers 77-12 through 77-13) located at pages 23 et seq. of the addendum is totally inadequate for the reason that the environmental effects of these requests assumes that the 21,298 acre feet per year represents a diversion figure.

In fact the 21,298 AF/Y represents a depletion, not a diversion, figure. It would therefore appear prima facie that the discussion concerning environmental impacts of the BLM request is deficient.

3. (a) The economic analyses of the DNRC proposed project at the Tongue River Reservoir Site (page 19), and the economic analysis of the Bureau of Reclamations proposed off-stream reservoir sites (pages 35, 37, 41 and 42) are inadequate to satisfy the mandates of Section 69-6504(3) RCM 1947, and MAC 36-2.2(6)-P240 which require that an EIS define the economic benefits and costs of the proposed action along with an assessment of the economic costs and benefits of each alternative.

(b) Moreover, the addendum and the DEIS and FEIS ignore the mandate of House Joint Resolution No. 73 approved March 16, 1974, which requires:

"That all agencies of state government are hereby directed to achieve forthwith the full implementation of the Montana Environmental Policy Act including the economic analysis requirements of sections 69-6504 through 69-6514 and guidelines for fully integrated environmental and economic analysis of major actions with significant effects on the human environment; and

"BE IT FURTHER RESOLVED, that economic analysis shall accompany environmental impact statements as required by the foregoing sections of the act and shall encompass an analysis of the costs and benefits to whomsoever they may accrue, including considerations of employment, income, investment, energy, the social costs and benefits of growth, opportunity costs, and the distribution effects; and

"BE IT FURTHER RESOLVED, that the Environmental Quality Council is directed to monitor agency compliance with this resolution and to report to the 1975 Legislative Assembly the extent of agency implementation of the act's requirements for full economic analysis; and

"BE IT FURTHER RESOLVED, that the executive director and staff are directed to fully perform the duties required by section 69-6514 to give consideration to economic goals and requirements of the state in implementation of the Montana environmental policy act; and

"BE IT FURTHER RESOLVED, that copies of this resolution be sent to the Governor, the Environmental Quality Council, and all state agencies."

For example, "an analysis of the costs and benefits to whomsoever they may accrue, including considerations of employment, income, investment, energy, the social costs and benefits of growth, opportunity costs, and the distribution effects" of the application requests are totally absent.

(c) The costs of approving the water reservation applications would include the cost to the state of preventing energy-oriented industries from diverting much of the Yellowstone River main-stem water.

(d) There is absolutely no evidence that the Environmental Quality Council has monitored the Department of Natural Resources and Conservation in compliance with House Joint Resolution No. 73, and thus, another state agency obviously has abdicated its responsibility in the environmental review process.

(e) There is absolutely no evidence that the executive director and staff have performed the duties required by Section 69-6514, R.C.M., 1947, so as to give full consideration to the economic goals and requirements of the State of Montana.

(f) The Addendum should state some basic assumptions made in performing cost-benefit studies:

- (A) interest rate
- (B) repayment period
- (C) items included in cost analysis, including the dam, the delivery systems, the farm irrigation systems, and operation, maintenance, and replacement;
- (D) and items included in the benefit analysis including gross or net farm receipts, crop yields, and farm enterprise costs.

(g) The Addendum should state the procedures employed to establish benefits and costs. The economic analyses prepared by the federal applicants should have been independently analysed by the Department if only to determine the validity of the procedures used by the federal government to arrive at their costs and benefits figures and their comparableness to the DNR's methods.

(h) Neither the DEIS or FEIS nor the Addendum establish a definition of benefits and costs used to form the basis of the economic analysis. Without such definitions little constructive analyses can be made of the economic analyses.

4. The Addendum does not purport to address the subject of the economic impact of additional income taxes and property taxes realized from the additional employment during the construction period, the permanent employment created by the capital structures, property value increases reflected in additional housing and other related buildings and business structures, and taxation of the industrial structures themselves.

5. There is absolutely no recognition of the economic impact which industrial developments--as an alternative to the described consumptive uses--would have in regard to the trust fund created out of coal tax revenue. Such an impact would have state, not just regional implications.

6. On page 50, the Addendum authors refer to deep ground water as an alternative source of water for energy-oriented industry. However, there is absolutely no credible evidence to support a thesis that there are viable ground water sources available. Indeed the weight of the evidence supports just the opposite conclusion.

7. The Addendum did not consider any environmental effects attendant on instream watering of animals which is suggested in the Bureau of Land Management's applications.

Dated this 15th day of July, 1977.

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